

September 14, 2023

Lawrence J. Vilardo  
United States District Judge  
Robert H. Jackson United States Courthouse  
2 Niagara Square  
Buffalo, New York 14202

**Re: USA v. Bongiovanni et al. (19-cr-277) / USA v. Gerace (23-cr-37)**

Your Honor:

This letter is intended to provide an update regarding the transfer of the file to new counsel and proposed scheduling related to pending legal issues and pretrial matters.

Since entering our appearance in this matter, Eric Soehnlein and I have been steadily working towards confirming the receipt of all material, including the entirety of the dockets, discovery, *Jencks* material, and other material contained in prior counsel's file.

We are facing various challenges. Because a substantial number of filings are under seal, there are various documents that we still do not have access to, including filings related to motions that are still pending. We are also organizing the file that we received, including efforts to determine whether we are in receipt of all of the previously disclosed material.<sup>1</sup>

The Court afforded us an adjournment of the trial to get fully acquainted with the file, which we are attempting to do while simultaneously working to resolve or adjourn other matters that we have pending so we can appropriately move forward in this case.

We understand that pending issues need to be resolved. At the appearance last week, the Court identified at least nine pending items that need to be addressed, not including any potential motions or issues that will be raised as we become more familiar with the evidence and legal issues in this case. The pending items include:

1. motion for pretrial release / reply to the jurisdictional issue;
2. motion in limine regarding Italian organized crime evidence;
3. motion for a gag order;
4. motion to suppress evidence, including Mr. Gerace's cell phone;
5. motion to dismiss the indictment;
6. motions in limine (motions from co-defendant and from Mr. Gerace);

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<sup>1</sup> We reached out to the Government in an effort to determine what material had previously been disclosed. The Government, at our request, provided all cover sheets and attached indexes on Tuesday which we have begun to utilize in reconciling the material we have with the lists of prior disclosures. The cover sheets and indexes alone amount to 122 pages of documents.



7. issues regarding the jury questionnaire;
8. Pretrial Order deadlines; and
9. motion for interstate transfer.

With tomorrow's status conference in mind, we have worked to categorize the urgency of each issue, mindful of the amount of time that is needed to properly address each matter

We are proposing and requesting to take these items in stages. This will allow us to work through the issues based on the urgency of each matter with consideration given to the amount of time necessary to sufficiently review and address each issue.

### **Stage One – Pretrial Release**

The most pressing issue from the defense's standpoint is the issue of detention. Mr. Gerace's custody status has an impact on each aspect of the case going forward, including the extent to which he is capable of assisting us to prepare his defense within the limited time leading up to trial.

The defendant's reply brief is due September 20, 2023; this would provide an opportunity for the defense to address the jurisdictional issues raised by the Government based on the pending appeal. In that regard, we note the defendant is moving to dismiss the appeal (Court of Appeals Docket no. 23-6392). The Government has indicated that it will not oppose the motion. That should render the jurisdictional issue moot. However, the defense would still like an opportunity to further address the issue of pretrial release. We request that the September 20 deadline serve as a date to reply to the prior filings and/or supplement the submissions with arguments of substituted counsel.

We would request an opportunity to argue this matter as soon as counsel may be heard after the September 20 deadline. The defense would request a date on September 21st or 22nd if either of those dates are available.

### **Stage Two – Pending Motions in Limine, Motion to Dismiss, and Motion for a Gag Order**

Shortly following the resolution of the detention/release issue, we could work to resolve the majority of the remaining issues that are currently pending.

This includes the evidence-based issues including the motion in limine related to admissibility of organized crime evidence and other pending motions in limine and the motion to suppress evidence from the search of cell phone.

It also includes the motion to dismiss and the response to the government's motion for a gag order.

The defense would request a deadline of October 11, 2023, for all submissions related to the issues listed above. That provides three weeks to address all of these issues following the deadline for submissions on the detention/release issue.



Counsel would be prepared to argue those matters as soon as counsel may be heard after the October 11 deadline, preferably anytime during the week of October 16 - October 20.<sup>2</sup>

### **Stage Three - Interstate Transfer**

The resolution of several pending matters, including evidentiary issues, may be relevant to the arguments related to Interstate Transfer. The defense requests that the deadline for the response regarding interstate transfer be initially set for November 3, 2023. It is our hope that this deadline would provide sufficient time to fully brief the issue and incorporate discussion based on the impact of any intervening decisions by this Court.

### **Stage Four – Pretrial Order Deadlines**

The Jury trial is scheduled to begin on January 8, 2024. Many pretrial submissions have already been submitted based on a Pretrial Order (Dkt. # 489) set based on an earlier trial date.

We respectfully request that a new Pretrial Order be issued with deadlines for the submissions that were previously identified by earlier pretrial orders.

The new deadlines would provide an opportunity for the timely filing of any remaining document(s). For submissions that have previously been filed, it would allow the parties to amend the submissions where appropriate, mindful that noteworthy events have transpired since the original submissions, including the death of a significant witness and the substitution of counsel.

The dates requested are consistent with the timeframes established in the previous Pretrial Order for submission of material in advance of trial. The following dates and deadlines are requested based on the January 8, 2024, trial date:

- Final Pretrial Conference: December 20, 2023
  - Final Status Conference: January 3, 2024
  - All pretrial submissions that are not indicated below: November 27, 2023
- A. Voir Dire Preparation
- a. Agreed-upon statement of the case: December 1, 2023
  - b. Any final amendments to the jury questionnaire: November 22, 2023
- B. Exhibit Lists and Exhibits
- a. Objections to Exhibits: December 4, 2023
- C. Witness Lists

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<sup>2</sup> Co-defendant's counsel, Robert C. Singer, Esq. is unavailable from October 21 - 26 due to military duty.



- a. Amendments to witness list: November 17, 2023
- D. Expiration of Stay to Disclose Witness Names/3500 Material to Defendants
  - a. November 27, 2023
- E. Stipulations
  - a. Government's proposed stipulations: December 1, 2023
  - b. Defendant's response to proposed stipulations: December 8, 2023
- K. Trial Memoranda and Motions in Limine
  - a. Trial Memo: November 15, 2023
  - b. Response to Trial Memo: December 1, 2023
  - c. Motions in Limine: November 15, 2023
  - d. Response to Motions in Limine: December 1, 2023
- L. Jury Instructions and Verdict Forms
  - a. Proposed jury instructions: December 1, 2023
  - b. Objections to proposed jury instructions: December 8, 2023
  - c. Proposed verdict sheets: December 1, 2023
  - d. Objections to proposed verdict sheets: December 8, 2023

Obviously, we defer to the Court's schedule, but we believe these dates would afford counsel sufficient time to appropriately address the pending issues and subsequently prepare all further pretrial filings.

We have presented these dates to counsel for co-defendant Bongiovanni, and his attorneys support the proposal above.

/s/Mark A. Foti  
Mark A. Foti, Esq.

Cc: All parties noticed by ECF